

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NOS. 2017-207-E, 2017-305-E, AND 2017-370-E

IN RE:	Friends of the Earth and Sierra Club,)	
	Complainant/Petitioner v. South Carolina)	
	Electric & Gas Company,)	
	Defendant/Respondent)	
)	
IN RE:	Request of the South Carolina Office of)	SOUTH CAROLINA OFFICE
	Regulatory Staff for Rate Relief to SCE&G)	OF REGULATORY STAFF'S
	Rates Pursuant to S.C. Code Ann. § 58-27-)	RESPONSE TO
	920)	SCE&G's OBJECTIONS
)	TO THE ADMISSIBILITY OF
)	NINE SANTEE COOPER
)	RECORDS
IN RE:	Joint Application and Petition of South)	
	Carolina Electric & Gas Company and)	
	Dominion Energy, Incorporated for Review)	
	and Approval of a Proposed Business)	
	Combination between SCANA Corporation)	
	and Dominion Energy, Incorporated, as May)	
	Be Required, and for a Prudency)	
	Determination Regarding the Abandonment)	
	of the V.C. Summer Units 2 & 3 Project)	
	and Associated Customer Benefits and Cost)	
	Recovery Plans)	

The South Carolina Office of Regulatory Staff ("ORS") submits this Response to the Public Service Commission of South Carolina's ("Commission") request for further briefing on the admissibility of nine specific South Carolina Public Service Authority's ("Santee Cooper") records submitted as exhibits to which South Carolina Electric & Gas Company ("SCE&G") maintains an objection.

ORS seeks to admit nine public and business records related to the V.C. Summer Nuclear Project obtained from Santee Cooper. SCE&G objects to the admissibility of these nine records.

ORS asserts that these records are admissible because they are all reliable and have been (1) authenticated, (2) offered as both public and business records through a proper records custodian to support admission into evidence in these consolidated proceedings, and (3) are admissible under SCRE Rule 803.

BACKGROUND

In Commission Order No. 2018-137-H entered October 3, 2018, Hearing Office Butler ordered the parties to meet or otherwise confer on or before October 19, 2018, in order to agree as fully as possible on the admissibility of all exhibits attached to pre-filed testimony in this case. In order to comply with the Order, ORS reached out to counsel for SCE&G and Dominion (collectively referred to herein as “Joint Applicants”), and the counsel for ORS, SCE&G, and Dominion met in person at ORS’s offices on October 17, 2018, with others in attendance by phone.

Prior to this meet and confer, ORS made every effort to limit its objections to any of the Joint Applicants’ documents and to assert minimal objections so the record for the Commission could be complete. ORS’s sole objections applied where it appeared that SCE&G’s lawyers may have drafted the SCE&G witness’ testimony or created exhibits of which the witness lacked personal knowledge. As a preliminary matter before the hearing began, ORS made it clear that it would waive even this limited concern about admissibility and instead make the same objections to the credibility of the SCE&G witnesses and about the weight of such evidence.

By contrast, the Joint Applicants made 38 pages of objections to proposed exhibits—many of which were to Joint Applicants’ own documents. Unfortunately, many of these objections lack a good faith basis. Most notably, the Joint Applicants objected to exhibits originally submitted by the Joint Applicants’ own witnesses as exhibits to be relied upon by the Commission to decide motions for relief made by the Joint Applicants. (*See* June 11, 2018 Response to Motion to Compel,

Exhs. 1-2). The Joint Applicants also objected, for example, to reliable but innocuous documents like Toshiba press releases and clearly admissible admissions from SCE&G's CEO.

During the meet and confer, the Joint Applicants stood by their objections and showed little appetite for compromise or for finding any resolution on even clearly admissible documents. For example, the Joint Applicants were unwilling to admit any documents to which it raised an objection and suggested that any e-mail to or from an SCE&G employee could be authenticated by putting that employee on the stand. Tellingly, counsel for SCE&G offered in jest to withdraw only one objection—that was to any Toshiba press releases written in Japanese. The Joint Applicants said they would take ORS's requests under advisement.

That Friday, two days after the meet and confer, instead of considering ORS's requests and limiting their objections to reasonable, good faith, and legitimate concerns about authenticity and admissibility, the Joint Applicants provided ORS with 50 pages of objections to its exhibits—12 more pages than what was discussed at the meet and confer. The new objections included objections to SCANA press releases from the SCANA website. As a result of SCE&G's unwillingness to compromise, ORS concluded another meet and confer was unlikely to be productive.

By the time the Joint Applicants submitted their Prehearing brief, SCE&G had mustered almost 100 pages of objections to ORS exhibits alone. SCE&G did not raise many of these objections during the meet and confer and never tendered a resolution of the objections with ORS, despite the directions given by the Commission in Order No. 2018-137-H. Just like the blanket designations of confidentiality, these blanket objections greatly increased the preparation necessary for the hearing, which may have been the tactic intended.

Notably, the night before the hearing began, SCE&G conceded all objections except to ten documents produced by Santee Cooper. One was a draft letter that apparently was never sent, and ORS withdrew sponsoring that one exhibit. Of the other nine, six are signed, either physically or electronically, by Santee Cooper's CEO at the time, Lonnie Carter.¹ Objections were waived to similar documents signed by other Santee Cooper witnesses, but the Commission may wish to take note that Lonnie Carter is not listed on the ORS witness list.

More importantly, with the certification by Santee Cooper's corporate secretary filed with the Commission, those public records are self-authenticating under the South Carolina Rules of Evidence (SCRE) 902(4). Several of these six exhibits signed by the CEO of Santee Cooper and certified by the corporate secretary also contain trade inscriptions, like the pre-printed letterhead and Santee Cooper logo,² which provide an independent basis for self-authentication under SCRE 902(7).

Another three documents to which the Joint Applicants continue to maintain an objection have been authenticated and introduced by the Corporate Secretary, who also serves as Vice President of Legal Services. One of the three documents objected to by the Joint Applicants is the corporate executive committee meeting minutes and handouts,³ a copy of which the corporate secretary, Ms. Warner, personally received. Another is the Bechtel Action Plan⁴, created by Mike Baxley, General Counsel of Santee Cooper and a member of Santee Cooper's legal department of which Ms. Warner is also a member. This document was provided to President and CEO Lonnie Carter and was used in meetings about the Bechtel Report after its issuance. The third document⁵

¹ Exhibits identified with Bates numbers: ORS_00010055, ORS_00011042, ORS_00011063, ORS_00011823, and ORS_00065013.

² Exhibits identified with Bates numbers: ORS_00010055, ORS_00011588 (presentations within the board materials include letterhead and corporate logo), and ORS_00065013.

³ Exhibit identified with Bates number ORS_00011588.

⁴ Exhibit identified with Bates number ORS_00008486.

⁵ Exhibit identified with Bates number ORS_00011823.

is a Santee Cooper email to the Board of Directors and other Santee Cooper executives, including Ms. Warner, providing an announcement by Toshiba Corporation of financial results for the third quarter of fiscal year 2016. These documents have been authenticated and introduced by Ms. Warner. There are no other requirements needed to authenticate or support these exhibits being admitted into evidence in these proceedings.

The last remaining document⁶ is a draft of a statement in the files of a public employee, Jason Williams, whose mode and practices of recordkeeping are known and were described in the testimony by Ms. Warner. This single exhibit is the only one that might merit further attention, and Ms. Warner's direct testimony satisfies the claim about genuineness and reliability.

The Joint Applicants also make arguments about these documents being hearsay, but each of these documents fall squarely under exceptions to the hearsay rule. The Rules of Evidence provide specific exceptions for these documents because they are public records, are records kept in the course of a business activity of Santee Cooper, and all of them have been authenticated and sponsored by a proper records custodian for Santee Cooper.

At this juncture, the Joint Applicants' strategy is apparent. Their aim has been not only to bog down this proceeding with unnecessary objections and thus hinder the parties from presenting all relevant facts to the Commission with objections and with claims of confidentiality, but also to simultaneously attempt to represent to this Commission that they want the Commission to have the full story. (*See, e.g.*, June 11, 2018 Response Filing at 5). The Joint Applicants' objections, however, are not supported by their own actions—when given the opportunity, they did not attempt to cross examine Ms. Warner about any of the documents at issue. Instead, they simply are standing on flimsy legal arguments in a brazen attempt to frustrate the process and prevent the

⁶ Exhibit identified with Bates number ORS_00040162.

Commission from receiving all reliable and admissible evidence required to provide an evidentiary foundation needed to rule on the momentous recovery they seek from ratepayers.

DISCUSSION

The law provides a clear path leading to admissibility of all nine exhibits that the Joint Applicants continue to claim should not be admissible. Rule 901(a), SCRE, requires that exhibits must be authenticated or identified as a condition precedent to admissibility. This requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims it to be. Rule 902 addresses certain self-authenticating documents, including public records certified by a records custodian.

South Carolina Code Ann. § 19-5-510 allows a “qualified witness” to identify business records. Under both the Rules of Evidence and § 19-5-510, the qualified witness may be either the custodian of the records or a person who is otherwise qualified to identify the records. “The authentication requirement ‘is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.’ ... ‘[T]he burden to authenticate ... is not high’ and requires only that the proponent ‘offer[] a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.’” *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014) (decided under Fed. R. Evid. 901(a)(3)); *see also Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (internal citation omitted); 29A Am. Jur. 2d Evidence § 1045 (2008) (“The authentication requirement does not demand that the proponent of ... evidence conclusively demonstrate [its] genuineness”).

Santee Cooper is a unique state agency. *S.C. Pub. Serv. Auth. v. Citizens & S. Nat. Bank of S.C.*, 300 S.C. 142, 161, 386 S.E.2d 775, 786 (1989). “Santee Cooper is also considered a state agency under current statutory law. Under current law, Santee Cooper “is a corporation

owned completely by the people of the State' for a 'public purpose' and is operated 'for the benefit of all the people of the State.' Santee Cooper also enjoys the many benefits and protections of a state agency." *Hodges v. Rainey*, 341 S.C. 79, 90–91, 533 S.E.2d 578, 584 (2000) (internal citation omitted). Santee Cooper has been established as a public agency.

As a public state agency, Santee Cooper's records are also "public records." Accordingly, Rule 803(8), SCRE, is applicable to the records in question. Rule 803(8), SCRE provides:

(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel; provided, however, that investigative notes involving opinions, judgments, or conclusions are not admissible. Accident reports required by S.C. Code Ann. §§ 56-5-1260 to -1280 (1991) are not admissible as evidence of negligence or due care in an action at law for damages.

The rule applies to records and statements setting forth the activities of the agency. The records in dispute in this matter are records kept by public officers and employees pursuant to a public duty and related to the public business of the V.C. Summer nuclear power plant construction project, of which Santee Cooper was a 45% co-owner with SCE&G—the party against whom the documents are being offered. Part of Santee Cooper's public purpose was its active participation in the Project, and the records clearly "set[] forth the activities of the agency." These public records are from the files of employees who were on the "nuclear team" and include inter-office communications in the form of memoranda, emails, and notes; materials shared with the Board of Directors; and correspondence to and from the President and CEO. However, these records are not investigative notes or reports, per Ms. Warner's unchallenged testimony.

ORS witness Warner is the Vice President of Legal Services and Corporate Secretary of Santee Cooper. She testified she is empowered to certify that the documents presented are the

official records of Santee Cooper. She also stated she examined the records, that she is familiar with the records, that she has personal knowledge the documents are stored in their regular course of business, and that the documents are true and authentic reproductions of the original documents now in Santee Cooper's possession.

Upon further questioning by counsel, Ms. Warner identified each of the nine documents at issue, identified which Santee Cooper employee had possession of the documents⁷, and explained their mode and practice of recordkeeping. Ms. Warner also explained that each of the nuclear team members maintained a file on the nuclear project and that after the abandonment of the project Santee Cooper gathered all the files from the nuclear team members both to maintain as public records and also to produce them when and as sought for public purposes, like these proceedings. She testified that these records were produced for this proceeding and subject to requests for relevant and material information about the Project and SCE&G's involvement and knowledge about the Project. Thus, Ms. Warner, as custodian of public records for Santee Cooper, described the public agency's officers and employees and their ongoing public duties of creating, maintaining, gathering, and producing the records of Santee Cooper, a state agency.

In addition to being authenticated and admissible as certified public records, these documents are also business records of Santee Cooper. South Carolina enacted the Uniform Business Records as Evidence Act in 1978. This statute is codified at S.C. Code Ann. § 19-5-510 and provides:

The term "business" shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

⁷ Six of the documents (Bates numbers ORS_00006973, ORS_00008486, ORS_00010055, ORS_00011042, ORS_00011063, and ORS_00065013) are from the files of Lonnie Carter, President and CEO of Santee Cooper; two of the documents (Bates numbers ORS_00011588 and ORS_00011823) are from Santee Cooper's corporate files which are maintained under Ms. Warner's direction; and one document (Bates number ORS_00065013) is from the file of Jason Williams, a member of Santee Cooper's nuclear team.

A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

The South Carolina Rules of Evidence adopted and effective in 1995, also addresses the admission of business records in Rule 803(6) which provides:

(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; *provided, however*, that subjective opinions and judgments found in business records are not admissible. The term “business” as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Thus, when properly authenticated by the custodian of the records or a witness with knowledge, records made in the ordinary course of business at or near the time of the event or transaction are admissible as an exception to the hearsay rule if the record is trustworthy in the opinion of the court. S.C. Code Ann. § 19-5-510 and SCRE 803(6). *See Ex parte Dep’t of Health & Envtl. Control*, 350 S.C. 243, 249–50, 565 S.E.2d 293, 297 (2002) (“Rule 803(6), SCRE, provides that memorandum, reports, records, etc. in any form, of acts, events, conditions, or diagnoses, are admissible as long as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court.”).

Also, the email with the Toshiba Corporation earnings report⁸ is admissible pursuant to SCRE 803(17) which addresses “Market Reports, Commercial Publications” and provides “[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.” SCRE 803(17).

Additionally, ORS’s expert witness, Gary C. Jones, P.E., reviewed and utilized the records provided by Santee Cooper in preparing his expert testimony and reaching his conclusions. Pursuant to Rule 703, SCRE, an expert in forming his opinion may rely on facts and data which are not admitted in evidence or admissible in evidence. “An expert witness may state an opinion based on facts not within his firsthand knowledge.” *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 295, 529 S.E.2d 45, 51 (Ct. App. 2000) (internal citations omitted). “He may base his opinion on information, whether or not admissible, made available to him before the hearing if the information is of the type reasonably relied upon in the field to make opinions.” *Id.* “Also, an expert may testify as to matters of hearsay for the purpose of showing what information he relied on in giving his opinion of value. The admissibility of the testimony of an expert on a fact in issue is largely within the discretion of the trial court.” *Id.* “Expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge.” *Watson v. Ford Motor Co.*, 389 S.C. 434, 445–46, 699 S.E.2d 169, 175 (2010). “Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions.” *Id.* These public and business records are the type relied upon by experts in his field and were relied upon by Mr. Jones in his testimony.

⁸ Exhibit identified with Bates number ORS_00011823.

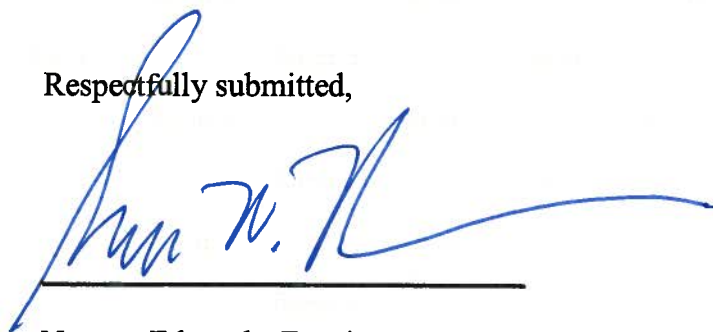
“‘Credible evidence’ is defined as ‘[e]vidence that is worthy of belief; trustworthy evidence.’ *Black’s Law Dictionary* 577 (7th ed. 1999). ‘Trustworthy’ is defined as ‘worthy of trust; dependable; reliable.’ *Webster’s New World College Dictionary* 1436 (3rd ed. 1997).” *State v. Grooms*, 343 S.C. 248, 252–53, 540 S.E.2d 99, 101 (2000). Hearsay is not reliable, unless an exception applies. However, both public records under SCRE 803(8) and business records under SCRE 803(6) are exceptions to the hearsay rule and are admissible. Ms. Warner also testified that these public and business records were not investigative reports and thus should be admitted for all purposes.

CONCLUSION

For the forgoing reasons and several independent bases, the records of Santee Cooper are properly authenticated and sponsored by Santee Cooper’s Corporate Secretary and Vice President of Legal Services, who is the appropriate records custodian. These exhibits are not precluded by the hearsay rule but are recognized exceptions to the hearsay rule, and accordingly should be admitted into evidence. Of course, the weight and credibility to be afforded to these records is reserved to the Commission as the finder of fact, but they are all admissible and should be admitted.

SIGNATURE ON PAGE 12

Respectfully submitted,



Nanette Edwards, Esquire
Jeffrey M. Nelson, Esquire
Andrew M. Bateman, Esquire
Jenny R. Pittman, Esquire
Steven W. Hamm, Esquire
OFFICE OF THE REGULATORY STAFF
1401 Main Street, Suite 900
Columbia, South Carolina 29201
Phone: (803) 737-0889/0823/0794
Fax: (803) 737-0801
Email: nedwards@regstaff.sc.gov,
jnelson@regstaff.sc.gov,
abateman@regstaff.sc.gov,
jpittman@regstaff.sc.gov
shamm@regstaff.sc.gov

Matthew Richardson
James E. Cox
WYCHE, P.A.
P.O. Box 12247
Columbia, SC 29211-2247
Phone: 803-254-6542
Fax: 803-254-6544
Email: mrichardson@wyche.com,
jcox@wyche.com

**Attorneys for the South Carolina Office of
Regulatory Staff**

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